



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Todd's Clearing and Grading

File: B-245617

Date: January 13, 1992

David A. Hearne, Esq., Outland, Gray, O'Keefe & Hubbard, for the protester.

Paul M. Fisher, Esq., Department of the Navy, for the agency.

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DIGEST

Protest that the agency improperly rejected apparent low bid as nonresponsive is sustained where the protester omitted the last digit of the solicitation number in its bid bond but otherwise properly completed its bid bond by referencing the bid opening date, the type of project work, and a specific penal sum, thus identifying the bid bond to the solicitation for which the protester submitted a bid, and there were no other ongoing procurements for which the protester's bid bond reasonably could have been intended.

DECISION

Todd's Clearing and Grading protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N62470-91-B-1071 (IFB-1071), issued by the Department of the Navy for agricultural outfall drainage improvements in Chesapeake, Virginia. Todd's bid was rejected because its bid bond contained an incomplete solicitation number.

We sustain the protest.

The IFB, issued on August 6, 1991, required each firm to submit with its bid a bid bond in the amount of 20 percent of its bid price. Eleven firms submitted bids by bid opening on September 5. Todd's submitted the apparent low bid of \$96,434. Todd's bid was accompanied by a bid bond on Standard Form 24 which referenced the bid opening date of September 5, identified the project in the "FOR (Construction, Supplies or Services)" block as construction, and stated in the "Penal Sum of Bond" block that the penal sum of the bid bond was 20 percent of Todd's bid price, with the amount not to exceed \$19,400. However, the bid bond also

referenced in the "Bid Identification" block an incomplete solicitation number, specifically IFB No. "N62470-91-B-107" instead of IFB No. "N62470-91-B-1071." The agency determined that because Todd's omitted the last digit of the solicitation number, its bid bond was defective and unenforceable. On September 9, the agency rejected Todd's apparent low bid as nonresponsive. On September 12, Todd's filed this protest. The award has been withheld pending the resolution of this protest. 31 U.S.C. § 3553(c)(1) (1988).

Todd's argues that the agency improperly rejected its apparent low bid as nonresponsive. Todd's bases its argument on our decision in Kirila Contractors, Inc., 67 Comp. Gen. 455 (1988), 88-1 CPD ¶ 554. In that case, the low bidder misidentified in the bid bond accompanying its bid a letter in the solicitation reference. We found its bid bond was nevertheless acceptable because it correctly identified the bid opening date and the project work. We also found that the erroneous solicitation reference in Kirila was an obvious typographical error and that there were no other solicitations with which the firm's accompanying bid bond could be confused. Relying on Kirila, Todd's argues that its failure to include in its accompanying bid bond the last digit of the solicitation number was merely a typographical error which should not affect either the acceptability or enforceability of its bid bond. In this regard, Todd's states that it referenced the correct bid opening date and properly identified the project as involving construction work. Todd's also states that IFB-1071 was the first federal procurement for which it submitted a bid and bid bond, and therefore, it had no other outstanding bids or bid bonds at the time of bid opening on September 5. Finally, Todd's states that the solicitation number for this procurement was not similar to any of the other five construction-type solicitations for which bids also were opened on September 5, and therefore, there could be no doubt that the bid bond which it submitted on September 5 was intended to cover its bid for IFB-1071.

The submission of a required bid bond is a material condition of responsiveness with which a bid must comply at the time of bid opening. Grafton McClintock, Inc., B-241581.2, Apr. 17, 1991, 91-1 CPD ¶ 381; Baucom Janitorial Serv., Inc., B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. When a bid bond is alleged to be defective, the determinative issue is whether the surety has sufficiently manifested an intention to be bound under the IFB so that the bid bond would be

enforceable by the government in the event of a default by the contractor. Joseph B. Fay Co., B-241769.2, Mar. 1, 1981, 91-1 CPD ¶ 234; J. W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. Where there is uncertainty that the bidder has furnished a legally binding bid bond at the time of bid opening, the bid bond is unacceptable and the bid must be rejected as nonresponsive. A & A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.


Whether a bid bond is acceptable even if it cites an incorrect solicitation number depends upon the circumstances. Kirila Contractors, Inc., *supra*. Where there are clear indicia on the face of the bid bond to identify it with the correct solicitation, the bid bond is acceptable. *Id.* In such a case, the incorrect solicitation number is merely a technical defect which does not affect the enforceability of the bid bond. *Id.*; Instruments & Controls Serv. Co., B-224293.2, Feb. 17, 1987, 87-1 CPD ¶ 170; Custodial Guidance Sys., Inc., B-192750, Nov. 21, 1978, 78-2 CPD ¶ 355. On the other hand, an incorrect solicitation number may make a bid bond defective where there is another ongoing solicitation to which the incorrect solicitation number could refer and, as a result, reasonable doubt exists as to whether the government could enforce the bid bond. *See* Fitzgerald & Co., Inc.--Recon., B-223594.2, Nov. 3, 1986, 86-2 CPD ¶ 510, *affirming* Kinetic Builders, Inc., B-223594, Sept. 24, 1986, 86-2 CPD ¶ 342 (bid bond identified another solicitation). Here, we find that, despite Todd's omission of the last digit of the solicitation number, there are sufficient indicia on the face of Todd's bid bond to identify it to IFB-1071, and therefore Todd's bid bond is acceptable and enforceable.

Specifically, Todd's correctly referenced in its bid bond the bid opening date of September 5, and affirmatively identified the project as construction. Further, in addition to expressing the penal sum of its bid bond as 20 percent of its bid price, Todd's also specified that the penal sum would not exceed the fixed sum of \$19,400. In this case, 20 percent of Todd's bid price is \$19,287, an amount close to the fixed penal sum. Moreover, the agency does not dispute that at the time of bid opening on September 5 for IFB-1071, a fiscal year 1991 procurement for drainage improvements, Todd's had no other outstanding bids as IFB-1071 was the first federal procurement for which Todd's had submitted a bid. While the agency argues that IFB No. N62470-90-B-0071, a procurement for the repair and widening of a road for which bids also were opened on September 5, reasonably may have been the solicitation which Todd's bid bond was intended to cover, for this to have been the case Todd's would have had to have made an error in the

year and two errors in the last four digits of the solicitation number in its bid bond. We think the agency's assertion in this regard is unreasonable.

Therefore, we find that there was no other procurement for which the Todd's bid bond could have been intended, and we conclude that the agency improperly rejected Todd's apparent low bid as nonresponsive. Accordingly, we sustain Todd's protest and are recommending that the agency make an award to Todd's, if otherwise appropriate. We find that Todd's is entitled to recover its costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1991). The firm should submit its claim for such costs directly to the agency.

The protest is sustained.


Acting Comptroller General
of the United States